ORIGINAL

LAW OFFICES
KOTEEN & NAFTALIN, L.L.P.
1150 CONNECTICUT AVENUE
WASHINGTON, D.C. 20036

BERNARD KOTEEN*
ALAN Y. NAFTALIN
ARTHUR B. GOODKIND
GEORGE Y. WHEELER
MARGOT SMILEY HUMPHREY
PETER M. CONNOLLY
CHARLES R. NAFTALIN
GREGORY C. STAPLE
R. EDWARD PRICE

* SENIOR COUNSEL

TELEPHONE
(202) 467-5700
TELECOPY
(202) 467-5915

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

January 26, 1998

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W
Washington, D.C. 20554

Re: Comments of Rural Telephone Coalition
CC Docket No. 96-45 (Report to Congress)

Dear Ms. Salas:

Transmitted herewith, on behalf of Rural Telephone Coalition are an original and 9 copies of its comments in the above-referenced proceeding.

In the event of any questions concerning this matter, please communicate with this office.

Very truly yours,

Margot Smiley Humphrey

Margot Smiley Humphrey

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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JAN 26 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	CC Docket No. 96-45
	)	(Report to Congress)
Federal-State Joint Board on	)	DA 98-2
Universal Service	)	

COMMENTS OF THE RURAL TELEPHONE COALITION FOR THE UNIVERSAL SERVICE REPORT TO CONGRESS

Margot Smiley Humphrey
Koteen & Naftalin, L.L.P.
1150 Connecticut Avenue, N.W.
Suite 1000
Washington, D.C. 20036
(202) 467-5700

January 26, 1998

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SUMMARY

The extraordinary Congressional call for a report on FCC implementation of the universal service requirements of the 1996 Act provides a unique chance for the new Commissioners — who explored the universal service commitment in the course of their confirmation process — to remedy a number of weaknesses in the implementation so far. An area that cries out for a course correction is the 25% federal support ceiling for the high cost mechanism necessary to carry out the national policy of affordable rates for all parts of the country and reasonably comparable rural and urban rates, services and access to advanced telecommunications and information resources. The 25% factor does not even maintain the current level of interstate participation because that is the base allocator, before adding in any of the existing high cost support allocations from the loop expense adjustment/USF, DEM Weighting and Long Term Support programs. The FCC should tell Congress it will follow the §254 requirement for "sufficient" federal support and will explore using its separations powers to look at all regulated retail revenues of interstate providers to apportion the federal support contribution.

The FCC should also reassure Congress that it will revise its rules to make sure the nationwide ratepayer pool is not saddled with excess support costs from mistaken policies like (a) directing that designation as eligible for support should consider the use of another carrier's facilities under an unbundled element arrangement — even if they are not high cost or in the relevant service area — as the same as investing in at least some of a carrier's "own facilities," (b) letting interexchange carriers avoid paying a fair share of interstate costs by the fiction that using unbundled elements transforms their traditional exchange access into a local service,

(c) providing new carriers support during the rural company transition based on the incumbent's actual costs without any showing that their own costs are high, and (d) not even letting the incumbent disaggregate its support under the interim plan, with the result that the new provider can serve only the lower cost parts of the service area, receive windfall support there based on the incumbent's area wide average costs and resell subsidized service to the high cost segments.

The FCC has correctly taken a wide view of who should contribute to the federal support mechanism. However, it should not have allowed the telecommunications component of information access to avoid contribution by treating Internet access providers as "end users" and exempting them from access charges that other telecommunications service providers are required to pay and which still contain implicit universal service contributions. Indeed, it should recognize that its old enhanced service rubric, which is no longer necessary as a backdoor way to forbear from regulation, has outlived its usefulness. The telecommunications service piece of mixed information and telecommunications provision should be treated like any other telecommunications service. The notion that Internet access is not a telecommunications service could have the side effect, already of concern to some rural voices in Congress, of disqualifying Internet access for households and businesses from receiving support, even though the law calls for an evolving definition of universal service. Internet use — including Internet telephony — is growing explosively and could soon become the kind of core service §254 means to make available for rural consumers, too.

The FCC needs to revise these eligibility, contribution and classification interpretations promptly. The current distortions threaten to undermine the §254 objectives and retard the impetus to modernize rural networks and services.

The report to Congress also provides a valuable opportunity to remedy some of the other implementation decisions and initiatives to harmonize regulatory policy with the new three-pronged national mandate — competition, universal service and deregulation. The FCC should allow disaggregation of support promptly and revise its ill-considered restriction on post-acquisition support, since both reforms are key parts of targeting only "sufficient" support to serve customers in high cost locations. The FCC should realize that the new law is not compatible with any arbitrary caps on necessary support, since the high cost principles are tied to achieving results. The FCC should also reverse its decision to free long distance providers from supplying the public with information essential to enforcing the express mandate of Congress for interexchange rate averaging and rate integration.

The notion of prescribing costs for a hypothetical network meeting idealized engineering and economic theory of how competition should function is dangerous and impractical. The FCC should not waste time and resources pursuing a chimera that is probably impossible to capture, puts at risk the continuing excellence of our nationwide network and is a magnet for contentious litigation. The same kind of waste and futility should persuade the FCC not to devote further time to a subsidy-bidding scheme that cannot be compatible with the universal service framework and objectives enacted by Congress. And forcing the combination of separate companies and scattered operations under common ownership in a state would not only interfere with targeted high cost support, but also amounts to deploying an even more excessive and counter-productive regulatory weapon to avoid the effects of earlier excessive regulation.

Finally, the FCC should step back and look at the many changes and initiatives it has launched, both to implement the 1996 Act and to reform its whole regulatory policy. As it moves forward, it will need panoramic vision to see how all the pieces fit together. Each regulatory requirement it adopts tends to impose costs on the regulated companies and their customers. The balance of how much expense to impose, when a requirement will be cost effective and how the cost it will be recovered from the public to compensate the carrier and whether the net benefit will be worth the cost are critical determinations that the FCC must be able to explain to Congress.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	CC Docket No. 96-45
	)	(Report to Congress)
Federal-State Joint Board on	)	DA 98-2
Universal Service	)	

COMMENTS OF THE RURAL TELEPHONE COALITION

The Rural Telephone Coalition (RTC) submits these comments in response to the Common Carrier Bureau's January 5, 1998 Public Notice, DA 98-2. The Notice invited public comment in connection with the FCC's obligation to report to Congress about implementation of the national universal service mandate enacted in §254 of the Telecommunications Act of 1996 (1996 Act).

The RTC is comprised of three associations of incumbent local exchange carriers (ILECs), the National Rural Telecom Association (NRTA), the National Telepone Cooperative Association (NTCA) and the Organization for the Promotion and Advancement of Small Telephone Companies (OPASTCO). Together, the associations represent more than 850 ILECs, throughout the United States. The small and rural ILECs in the three RTC associations typically provide service in rural areas, where lower population density and traffic volumes result in higher costs of service than for metropolitan markets. Accordingly, the RTC has been an active participant before Congress and the FCC, urging enactment and implementation of universal service policies which will provide the member ILECs' customers and communities with affordable, evolving, modern telecommunications and information capabilities and services.

<u>This Universal Service Review Mandated by Congress Provides a Valuable Opportunity for the Newly Comprised FCC to Bring National Universal Service Policy into Compliance with the Statute and Congressional Intent</u>

The applicable 1998 appropriations legislation requires the FCC to "review ... [its own] implementation ... of the provisions of the Telecommunications Act of 1996 (Public Law 104-104) relating to universal service." The review must include scrutiny of the consistency with the statute and impact on high cost and rural areas of various FCC interpretations and actions implementing or related to the 1996 Act's blueprint for the preservation and advancement of universal service. The implementation process is far from complete: Numerous issues raised in petitions for reconsideration remain unresolved and related petitions for judicial review remain pending in the Fifth and Eighth Circuits. Many members of Congress have criticized the FCC's implementation of the universal service provisions.

This extraordinary legally- required review by the FCC, separate from the review procedures already invoked by the parties, provides a unique opportunity for the new FCC (a) to take a fresh, <u>i.e.</u> <u>de</u> <u>novo</u> look at the issues, informed by the input from Congress during the recent confirmation process and (b) to conduct appropriate further proceedings to make adjustments necessary to comply with the letter and intent of the 1996 Act. To assist the FCC in taking advantage of this opportunity for reevaluation, the RTC suggests several respects in which the FCC's interpretation and applications of statutory definitions conflict with and undermine the achievement of the §254 principles for rural customers.

Arbitrarily Reducing the Federal Share of Universal Service Support to 25% of What Is Necessary to Provide Federally-Defined Universal Services Flatly Conflicts with §254

The FCC suddenly announced in the universal service implementation decision[1] that it would limit federal responsibility for the high cost support necessary to provide the universal services defined under §254(a)-(c) as "services that are supported by Federal universal service support mechanisms." It set the federal ceiling at 25% of the support calculated as necessary to provide the federally-defined level of universal service.

The principle advantages of using a federal support mechanism, ultimately spread over all interstate customers, to collect a sufficient share of the costs for providing nationwide affordable telephone service from a nationwide customer base are (a) that universal service over a nationwide, publicly available switched network benefits (and should be paid for by) all users of that nationwide network resource and (b) a nationwide contribution mechanism avoids the excessive rates that would result from forcing the highest-cost locations or states to recover a larger share of their high service costs in local rates. Nothing in the plain language or legislative history of §254 even hints at any congressional intent to diminish the federal share of federally defined universal service support or to change support levels and mechanisms and bring about huge rate hikes in high cost states. Indeed, the Conference Report (p.131)[2] criticized the previous universal service rulemaking efforts, which had been devoted in large part to controlling and

[1] Federal-State Joint Board on Universal Service, 12 FCC Rcd 8766, ---- (May 8,1997) (Universal Service Order), petitions for reconsideration and judicial review pending.

[2] Conference Report to accompany S. 652, 104th Cong., 2nd Sess. (February 1, 1996).

reducing interstate support through interstate rates. And the §254(e) instruction to make federal support mechanisms explicit is accompanied by an express requirement for federal universal service support "sufficient to achieve the purposes of this section."

Instead, the FCC slashed the federal contribution responsibility to one quarter of the necessary support. The 25% funding cap had not been proposed before, subjected to public comment or considered in the §254 joint board recommendation. The FCC's stated rationale — that the 25% limit simply adopted the existing interstate share of loop costs — is factually incorrect because the 25% interstate loop allocator excludes all of the pre-existing explicitly identified interstate high cost support. The 25% factor the FCC adopted thus ignores both the existing implicit support resulting from averaging access costs and interstate universal service fund support for high loop costs, Long Term Support and DEM Weighting support for higher rural switching costs.[3]

The FCC's limit on interstate support was a reaction to Joint Board resistance to apportioning carriers' contributions to federal support mechanisms on the basis of both their inter- and intrastate revenues. That dual jurisdiction revenues contribution measurement was recommended and adopted for school, library and rural health care provider discounts under §254(h). and, in any event, the jurisdictional dilemma was not serious: first, the FCC and

[3] In his January 12, 1998 speech to OPASTCO (p. 4), FCC Chairman Kennard made a comparison between price cap and rural telephone companies that dramatically illustrates how much the FCC's 11th hour 25% federal high cost support ceiling departs from previously existing universal service support. Traditionally, extensive support was achieved by means of above-average interstate jurisdictional allocations and, thus, greater interstate cost recovery, for high cost rural LECs: The Chairman, describing the acute challenge of serving high cost rural areas, gave the example that "Some of you receive more than half of your total revenues from interstate access and universal service, compared to just over 25% for the price cap carriers."

§410(c)-§254 (a) joint board control all jurisdictional classifications. They have broad discretion to effectuate contributions based on total revenues. There is no economic answer to the artificial Part 36 distinctions made necessary by dual state and federal regulation. Moreover, pre-separation revenues were not used to quantify the level of federal support, but rather only to apportion a level derived by a formula among the interstate providers required to contribute to high cost support.

Indeed, in invoking the 25% jurisdictional allocation factor as an existing support ceiling, the FCC refused to follow its own existing support strategy of allocating costs to the interstate jurisdiction that would otherwise have to be recovered by higher local rates to spread the costs nationwide. The existing universal service fund loop support had operated in that manner since 1984, using an "expense adjustment" to keep local rates affordable, that is, designating an above-average portion of the expenses reflected in a LEC's total unseparated (dual-jurisdictional) costs for recovery as "interstate" revenues. Given (a) the long FCC and joint board history and judicial endorsement of using jurisdictional classifications or allocations of property costs, expenses and revenues to advance universal service objectives[4] and §254's assignment of responsibility for implementing the federal universal service support mechanisms to a §410(c) joint board, a body designed to determine jurisdictional allocations, with an added consumer representative, Congress plainly anticipated that support could continue to be realized via jurisdictional allocations after the 1996 Act took effect. The FCC could readily have resolved the spurious problem of including "intrastate" revenues by calculating and classifying as

[4] See, e.g., Rural Telephone Coalition v. FCC, 838 F.2d 1307 (D.C. Cir. 1988).

interstate contributions the necessary share of a carrier's total revenues to fund its share of the nationwide universal service expense.

It is not only rural service providers and rural states that are concerned with the FCC's 25% support limit. A joint filing by the General Services Administration and the Department of Defense in a related proceeding chided the FCC for not accepting the full responsibility placed on it by §254.[5] Those agencies also urged the FCC to include intrastate and interstate revenues in the federal universal service support contribution mechanisms.

The FCC should use its report to Congress as an opportunity to recognize its responsibility for obtaining contributions sufficient to provide the universal service support found necessary by the federal support mechanism, to recognize its authority to apportion the total necessary federal support among <u>all</u> interstate service providers for their contributions based on their total, unseparated end user revenues, and to employ an "expense adjustment" to classify the expenses these universal service contribution revenues are collected to recover as "interstate" and, as it has in the past, direct the carriers to reflect the savings from expenses shifted to interstate to prevent local rate increases. The ongoing reconsideration proceedings arising from Universal Service Order could be quickly completed by adopting these modifications to comply with §254. That action, in turn, could reduce the time and resources the FCC, Congress, the courts and the affected parties will need to devote to ongoing challenges of the FCC's interpretations and actions in light of the Act's provisions and Congress's intent.

<u>The FCC Exceeded Its Authority and Misinterpreted the 1996 Act in Determining Who</u>

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[5] Comments of the General services Administration and the United States Department of Defense, CC Docket No. 80-286 filed Dec. 10, 1997).

Is Eligible for Specific Federal Universal Service Support Because American Telecommunications Customers Should Not Have to Provide Support for Non-Facilities-Based Service

Although the FCC correctly observed that the states have been given authority to designate those Eligible Telecommunications Carriers (ETCs) that may receive support under §254(e), it nevertheless has issued some interpretations of §214 that are inconsistent with the Act and with each other. Section 254(e) limits federal support to §214(e) ETCs. ETC designation under §214 requires a carrier to offer the federally-defined universal services "either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another [ETC] ...." Thus, the statutory language expressly provides for support for an entrant without requiring it to construct "its own facilities" for 100% of its competitive operations in a specific geographical service area. However, §214(e) bars designation and support for a carrier whose commitment to the area is limited to using another carrier's facilities by resale and limits states designations to carriers meeting those statutory eligibility requirements.

Instead of implementing the section as enacted, the FCC rewrote it to provide for designation as an ETC even for a carrier that does not construct <u>any</u> facilities in the support area and uses one or more other carriers' facilities. The other carrier's facilities may even be located entirely in a low cost area outside the area for which the CLEC obtains designation and support. The FCC bases this bizarre ruling providing high cost support without high cost facilities on the fiction that by obtaining the use of another carrier's facilities to provide competing service under the §251 requirement for using an incumbent's facilities as "unbundled network elements" (UNEs) transforms the facilities from the underlying carrier's "own facilities" into the acquiring and re-offering CLEC's "own facilities." That interpretation guts the statutory safeguard against giving high cost support to a carrier that does not incur the high costs or invest at all in the infrastructure of the high cost area. It also evades the requirements in §254(e) and (k) that a carrier use federal support only for the facilities and services for which that support is intended and that universal services may not bear more than a reasonable share of the joint and common costs of facilities used to provide those services. The nation's end users should not be required to bear the cost of providing support to CLECs that may not even choose to incur <u>any</u> of the costs of facilities in a rural area, let alone the <u>incumbent's</u> high costs for required provision of universal service.

The FCC should also rectify this error of providing transitional universal service support to CLECs in rural telephone company markets based on the historical costs of the incumbent LEC, with no demonstration that the CLECs have high costs, much less that the arbitrary award of the ILECs' per line high cost support meets the explicit statutory requirements to use support "only for the provision, maintenance and upgrading of the facilities and services for which the support is intended," §254(e), and not to support any other services, §254(k).

<u>The FCC Has Properly Implemented the Nationwide Contribution Mechanism Broadly, But Some Unwarranted Discrimination Remains to Be Corrected</u>

One purpose of the 1996 Act was to broaden the base for contributions toward universal service to prevent unfair support burdens and competitive distortions and remove the discrimination and competitive inequities of recovering a major portion of universal service costs from a limited universe of carriers and their customers . The Act requires in §254(d) that <u>all</u> carriers that provide interstate telecommunications services "shall contribute on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service." The Commission may only exempt a carrier from contributing if its contribution would be "de minimus." The Conference Report (p. CR-131) explained that Congress intended to limit carrier exemptions to "cases where the administrative cost of collecting contributions from that carrier would exceed the contributions that carrier would otherwise have to make under the formula for contributions selected by the Commission." The subsection also empowered the FCC to require contributions from other interstate providers under a public interest standard.

The FCC correctly interpreted and implemented the contribution provision broadly. It rejected efforts by interstate providers to avoid contributing on the excuse that they would not be USF recipients, since the law and legislative history do not provide for exemption on that basis. The FCC found that it was in the public interest to bring in non-carrier interstate telecommunications providers. And, initially, it limited exemptions to cases where collection expenses would exceed a carrier's contribution.

The following modifications would bring the FCC's implementation even further into compliance with the law and intent of Congress:

1. The FCC should base contribution calculations for all three facets of its nationwide universal service support mechanisms on the total, unseparated end user revenues for each carrier. This unseparated revenues contribution measurement, already adopted for institutional discount programs, should thus be expanded to encompass high cost and low income support. The FCC would, accordingly, excuse a carrier from contribution to the nationwide federal universal service support program as a wholly and exclusively intrastate provider solely if it does not use or resell <u>any</u> interstate service, capability or facility, transport any interstate telecommunications or depend on any federally licensed frequency to provide any of its within-state telecommunications services.
2. The FCC should terminate the discrimination among telecommunications resellers that allows information service providers to resell telecommunications services obtained

from other carriers without paying any contribution for universal service directly or any passed-through federal support contribution paid by the underlying carrier.

The FCC Should Not Exempt Internet Access by ISPs or Unbundled Network Elements Used for Interexchange Access from Paying Access Charges

The 1996 Act embodies Congress's policy vision for telecommunications in the next millennium, establishing a framework based on competition and deregulation, carefully buffered to ensure affordable, readily available telecommunications services and information access and advanced network capabilities and services for the entire American public. So far, however, the FCC's implementation has not effectively pursued those principles as long term objectives, but instead has manipulated the Act's concepts and definitions to pursue short term objectives that threaten to impede the future telecommunications and network Congress embraced. Two examples of this short term thinking are the inconsistent and paternalistic interpretations the FCC has cobbled to from the Act's provisions (a) to maintain market distortions that stimulate Internet growth and usage and (b) to jumpstart local competitor entry and market share. The FCC should be aware that the damaging longer term effects of these market distortions will impede the very infrastructure development and nationwide evolving universal service resources — such as the Internet — that Congress intends to make available to all telecommunications and information users in the next century.

The FCC's Inconsistent and Manipulative Application of the Act's Definitions To Internet Access and Other Information Service Telecommunications Components Conflicts with the National Policy of Widely-Available Advanced Telecommunications and Information Delivery Networks

The FCC has used the fiction that Internet access providers and other information service providers (ISPs) are "end users" rather than both telecommunications resellers and information providers to exempt those industries from interstate access charges. Although the FCC has not denied that these service providers use the local telephone distribution link to the customer in the same way that an interexchange carrier providing voice and data services does — to pick up and deliver customer-controlled information for customers, it has treated the two users dramatically differently. Both use another carrier's circuit to link the ultimate customer to the LEC central office, obtain transport for the messages to the point of presence of an interexchange carrier or (in rare cases of Internet access provision) to another destination within the same local exchange. (The only relevant difference that has been identified between other customers' access traffic and Internet access traffic transported by LECs is that Internet access makes longer use of the loop from the originating location to the LEC central office). Nevertheless, the FCC acquiesces in the current arrangement whereby an Internet access provider obtains the circuit between the customer and the central office by paying local business rates.[6] In contrast, the interexchange carrier obtains transmission of its customer's voice or data by paying federal access charges assessed under part 69 of the FCC's Rules. These charges reflect costs properly allocated to interstate service.

The FCC recognizes that access charges continue to include costs that contribute to mitigating differences in local rates for customers it costs more to serve. Indeed, it justified the exemption to access charges for Internet access providers for this reason. There is no serious

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[6] Internet Access Providers also pay a capped flat rate Subscriber Line Charge related to interstate access, but the FCC's policy prevents LECs from recovering Internet Access Providers' share of interstate costs from access charges, as they do with interexchange costs. In preserving the access charge exemption, the FCC referenced only the local end user business line charges in connection with Internet access.

dispute that Internet communications are predominantly interstate and international.[7] However, the FCC has persisted in deliberate discrimination in its cost recovery treatment of the two indistinguishable circuit uses, candidly stating that it does not want to slow the dramatic growth of the Internet. At the same time, by relegating LECs to end user cost recovery in local business line charges, the FCC has led to NECA's decision to treat Internet access costs as jurisdictionally intrastate, in spite of the predominance of interstate access usage by Internet access providers. Until the FCC provides for lawful interstate cost recovery, NECA presumably thought it prudent to match the jurisdictional treatment to the cost recovery source — local business end user rates — to mitigate the shortfall in interstate common line cost recovery its members would otherwise suffer.

The deregulation by redefinition strategy has not even been applied logically or consistently. For example, the FCC did not follow its distinction between the "conduit" service portion of Internet access (i.e. the common carrier transmission functions that are explicitly within the 1996 Act's definition of "telecommunications") and the information service functions related to manipulating the content described in the Universal Service Order discussion of institutional discounts.[8] Internet access for interstate communications, the primary traffic, is

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[7] There are questions about how feasible measurement of the inter- and intrastate usage would be. However, it seems clear from the nature of the Internet that jurisdictionally intrastate, and especially local, communications on the Internet are de minimus. Accordingly, the Internet access providers' service from the underlying LEC is predominantly interstate access.

[8] Federal-State Joint Board on Universal Service, 12 FCC Rcd 8766, 9013 (rel. May 8,1997) (Universal Service Order), petitions for reconsideration and judicial review pending.

squarely within the §3 (48) definition of "telecommunications"[9] and, made available by resale of ILEC loops to the public, also fits the definition as "telecommunications services."

Using definitional leger de main to spare Internet access providers from absorbing a fair and nondiscriminatory share of the interstate common line costs they cause, but that other access providers or resellers must shoulder via access charges, is neither technology- nor competition-neutral. It impedes the realization of the rural/urban rate and service comparability and similar access to advanced telecommunications and information services that undergird the national universal service commitment enacted by Congress. The adverse spiral will become more intense as Internet services continue to attract new users and increasingly duplicate the functions of the pubic switched network, as is the case with Internet telephony. It is irrational to maintain a mistaken and discriminatory policy that (a) attracts voice service users away from the public switched network and (b) excuses them from contributing to universal service support and (c) saddle residual PSTN users with an ever-growing share of the necessary support. Differences in packet switching technology, digitalization of the customer-controlled content of a voice communication or use of e-mail headers are not sensible reasons to treat ISPs and other LEC transport resellers as fundamentally different entities. It is like saying that if telegraphy was

[9] The definition of "telecommunications", §3(48), includes "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." Offering telecommunications for a fee to the public constitutes "telecommunications service" under the definition in §3(51), and the provider of telecommunications services is defined as a "telecommunications carrier" in §(49). It is nonsense to read these definitions to find that Internet voice telephony is not a telecommunications service just like traditional wireline telephony simply because it is digitized and transmitted in packets for part of the route, though not while it uses the LEC loop connection, resold by the Internet access provider, for transmissions over the circuit the Internet access call holds open between the end office and the customer.

telecommunications, the use of different technology to provide voice communications meant that the new service must be something other than "telecommunications" or that recording a voice telephone call message on an answering machine with a date and time stamp transforms the whole voice transmission from a telecommunications service to an information service.

Thus, the fatal flaws in the decision to exempt information access providers from access charges and other direct or indirect carrier and reseller contributions include the failure to treat all similarly-situated providers alike, the open invitation to game the system that exemption by redefinition presents and the profound disincentive for extending new network technology, capabilities and services to the high cost rural communities that Congress intended to participate in future telecommunications and information progress. It is not that access charges are ideal; access reform is far from complete. But a nondiscriminatory, technology neutral and competitively even-handed access and universal service support system can only be rationally and equitably pursued if all equivalent interstate uses of LEC distribution are placed on an equal footing and have like incentives to rationalize rather than to continue to escape the support system.

Defining Internet Access Providers as End Users Instead of Telecommunications Providers Interferes with Support and Incentives to Improve High Cost Area Internet Access

Another result of the Internet end user classification, moreover, has been to treat Internet access as a non-telecommunications activity. This strategy is doubtless the result of the FCC's pre-1996 Act ploy to avoid regulating mixed telecommunications and information services by defining "enhanced" services to include both the telecommunications and the information functions in using the local LEC distribution loop.

The new law's restriction of institutional discount support to telecommunications carriers in §254(h), like the §254(e) restriction of high cost support to designated ETCs, would have thwarted the FCC's wish to extend support to Internet access providers that gave discounts to classrooms. The FCC had defined ISPs as end users and much Internet access as enhanced service under pre-1996 law to avoid regulating information functions along with the telecommunications functions. Hence, the FCC read into paragraph (2) of §254(h) the authority to provide support to Internet access providers as non-telecommunications carriers.[10]

Unfortunately, the side effects of the FCC's adherence to its historical strategy of deregulating by manipulating the definition of what was within its jurisdiction— no longer necessary under the new law's forbearance authority with appropriate findings and conclusions (§10) — include denying universal service support to Internet access in a few years, when it may well be defined under the evolving universal service standard of §254(c) as a universal service. However, it will not then be eligible for high cost support pursuant to §254(e), since only telecommunications common carriers can obtain the requisite ETC designation under §214(e). Higher costs of rural service will mean higher charges for rural Internet access. Since Internet access involves functions that are manifestly within the definition of "telecommunications," the mis-classification will undermine the universal service evolution and rural rate and service parity envisioned by Congress. Denying high cost support for rural Internet access will also stifle rural access providers' incentives to deploy advanced and competitive Internet technology to improve rural customers' access to the Internet.

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[10] Federal-State Joint Board on Universal Service, CC Docket No. 96-45, FCC 97-420, ¶190 (released Dec. 30, 1997).

The explosive growth of Internet use, and especially the availability of voice telephony — including interstate calling over the Internet for only the flat local business charge — point a clear path towards the Internet as the widely available "basic" service not too far in the future. As interstate callers move to Internet telephony to avoid charges that recover the costs caused by their calling, including access charges that still have universal service support, the cost of supporting traditional universal service to customers without Internet access or without local Internet access will have to be spread over dwindling traffic and customers. And LECs will have a disincentive to incur the costs of upgrading to improve Internet access and packet switching technology because those costs will be spread over all their local customers, rather than properly recovered from the Internet access providers and, ultimately, their customers.[11] Rural areas, in particular, stand to suffer from such an impediment to obtaining "reasonably comparable" services , as Congress intended.

Realization that fictionally defining away the telecommunications aspects of Internet access could impede rural Internet availability led to the requirement for an FCC report to Congress on universal service implementation. Treating Internet access providers as non-carriers and all their activities as non-telecommunications because they use packet switching, digitalize

[11] Further exacerbating the network distortions caused by today's faulty classification of Internet access providers as local business line customers is the consequent conclusion by NECA that the costs must be allocated to the intrastate jurisdiction, although the use of Internet is predominantly interstate and foreign and there has been no jurisdictional cost allocation to the states under §§221 and 41(c). The RTC is (a) urging the Joint Board considering separations reform in CC Docket No. 80-286 to rectify this clearly erroneous jurisdictional allocation and (b) urges the FCC to provide immediately for lawful recovery of Internet access costs via nondiscriminatory interstate access charges or some other interstate cost recovery charge imposed on Internet users by interstate providers.